DISPUTE RESOLUTION AND THE TREATY OF GUADALUPE HIDALGO: PARALLELS AND POSSIBLE LESSONS FOR DISPUTE RESOLUTION UNDER NAFTA

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I. Introduction

It has been 150 years since the United States and Mexico entered into the Treaty of Guadalupe Hidalgo (Treaty). In 1848, the Treaty ended the war between the United States and Mexico. The Treaty purported to protect certain rights of Mexican citizens in the areas ceded to the United States. Over the years, Mexican-Americans have sought to litigate their rights that were supposedly protected by the Treaty.

Subsequently, in 1993, the United States and Mexico entered into another important treaty – the North American Free Trade Agreement [hereinafter NAFTA]. The NAFTA created considerable con-

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trovery in the United States. It governs trade between the NAFTA parties: Canada, Mexico and the United States. The NAFTA parties trade hundreds of billions of dollars worth of goods a year. Thus, one can expect that many trade disputes will arise under NAFTA. As a result, NAFTA has provided procedures for dispute resolution.

This article seeks to briefly discuss the experience of Mexicans and their Mexican-American heirs in litigating their rights under the Treaty of Guadalupe Hidalgo. It seeks to ask whether there may be any parallels and possible lessons to be learned from the litigation experience of Mexican claimants under the earlier Treaty for the NAFTA parties—especially Mexico—as the NAFTA parties engage in dispute resolution.

Part II of this article sets out the background of the Treaty, including a brief review of the United States-Mexican War. It describes the terms of the Treaty and observes that Mexico had an unequal bargaining power when it negotiated the Treaty with the United States. It describes how the Treaty sought to protect the rights of the former Mexican citizens in the conquered territories but was ultimately unable to do so. In seeking to litigate their rights under the Treaty, the dispute resolution process generally failed to protect Mexican claimants and their heirs. Through a variety of legal devices, the promises of the Treaty were devalued. In particular, implementing legislation undermined the property rights protections in the Treaty. It did so by, among other things, requiring Mexican claimants to assume the burden of proof in proving the validity of their titles and negotiate a maze of legal requirements in a foreign legal system and in a language that

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5. See id.

6. See id.
was foreign to them. The implementing legislation also established what might be viewed as alternative dispute resolution to resolve claims, e.g., the office of the surveyor general. These alternative tribunals sometimes created difficulties for the Mexican claimants. Similarly, the Treaty failed to protect full membership rights in American society to persons of Mexican ancestry. For all these reasons, the promises of the Treaty were minimized and devalued.

Part III of the article explores parallels between the NAFTA dispute resolution process and the dispute settlement process of the Treaty of Guadalupe Hidalgo. In this regard it notes that just as with the earlier Treaty, Mexico negotiated the NAFTA from a very weak bargaining position. As a result, just as the United States had virtually dictated the terms of the Treaty of Guadalupe Hidalgo, the United States imposed conditions on Mexico in the NAFTA. In the dispute resolution context, Part III explains that this means that the United States imposed on Mexico, especially in the NAFTA Chapter 19 areas of antidumping and countervailing duties, procedural rules based on United States procedural law. By so doing, the NAFTA dispute resolution process may generate a number of difficulties for Mexico that parallel problems that Mexican claimants experienced in litigating their rights under the earlier Treaty. Among these are difficulties arising from language, the unique burdens that are experienced by one who must litigate in a foreign legal system, i.e., the NAFTA dispute resolution process which is based on Anglo-Saxon notions of procedure, and misunderstandings of Mexican law by North American panelists. In the course of the discussion, part III also points out that in constructing the NAFTA dispute settlement procedures, Mexico was treated in ways that parallel the dominant society's treatment of Mexican-Americans in the years since the Treaty of Guadalupe Hidalgo. Part III also explains that the NAFTA dispute resolution procedures may be viewed as alternative dispute resolution. It argues that Mexico will likely experience difficulties in the NAFTA alternative dispute resolution regime in light of its position as a relatively weak disputant. This generates another parallel: Mexican claimants experienced difficulties arising out of the alternative dispute resolution-like system established under the Treaty of Guadalupe Hidalgo. Given all of this, part III concludes that there is reason to think that the NAFTA dispute resolution process may put Mexico at a disadvantage just as the earlier Treaty of Guadalupe Hidalgo dispute settlement process placed Mexican claimants and their heirs at a disadvantage. In this regard, part III notes that an analysis of the early results of the
NAFTA dispute resolution process shows that Mexico has fared the least well of the three NAFTA countries.

II. The Treaty of Guadalupe Hidalgo

In the 1800s, many in the United States believed it was America's destiny to expand westward so as to govern the entire continent.\(^7\) Writing in 1845, journalist John O'Sullivan explained: "[T]he American claim is by the right of our manifest destiny to overspread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federative self-government entrusted to us."\(^8\)

In accordance with this notion of "manifest destiny," in 1846, the United States went to war against Mexico in an effort to incorporate the western territories of California and New Mexico and certain Texas borderlands.\(^9\) At the war's end in 1848, the Treaty of Guadalupe Hidalgo required Mexico to cede about half of its then existing territory.\(^10\) Much of the American West and Southwest was acquired by the United States in the 529,000 square mile cession by the Republic of Mexico.\(^11\) Thus, the United States conquered Mexico in 1848. The Treaty of Guadalupe Hidalgo completed that conquest and, therefore, completed the conquest of the Southwest.\(^12\)

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9. See Klein, supra note 7, at 208; see also HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION, SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 84 (1990) (describing President Polk's term in office, during which the Mexican War occurred as "an almost frantic period of territorial conquest"); J. J. Bowden, Spanish and Mexican Land Grants in the Southwest, 8 LAND & WATER L. REV. 467, 467 (1973) ("Contrary to the avowed policy of the United States not to prosecute a war for the purpose of securing additional territory, President James K. Polk, following the outbreak of hostilities with Mexico, formulated a plan for the speedy military conquest and possession of New Mexico and California in order to insure their acquisition by the United States when peace was made.") (footnotes omitted).
10. See Klein, supra note 7, at 201. See also Bowden, supra note 9, at 468-70; CHARLES F. WILKINSON, THE AMERICAN WEST: A NARRATIVE BIBLIOGRAPHY AND A STUDY IN REGIONALISM 7, 23 (1989).
11. See Klein, supra note 7, at 201. See also Bowden, supra note 9, at 468-70.
12. See RODOLFO ACUÑA, OCCUPIED AMERICA: THE CHICANO STRUGGLE TOWARD LIBERATION 9-33 (1972); Kevin R. Johnson, An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties, 5 SW. J. L. & TRADE AM.; see also PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST, THE UNBROKEN PAST OF THE AMERICAN WEST 26-28 (1987) ("Conquest forms the historical bedrock of the whole nation, and the American West is a preeminent case study in conquest and its consequences") Id. at 28; Louis A. Martinez, En Aquel Entonces Y Ahora: Popular Literature As the Mirror of Political and Cultural Conflict, 5 SW. J. L. & TRADE AM. 77, 77 (1998) (the Treaty of Guadalupe Hidalgo "was spawned in era in which the
In agreeing to the Treaty of Guadalupe Hidalgo, Mexico—a conquered nation—obviously had much less bargaining power than the United States. The Mexican government was under tremendous political and financial pressure to sign the Treaty. Mexican officials viewed the treaty as a final opportunity to preserve Mexico. With the American Army just outside of Mexico City, they believed that if the war continued, all of Mexico would have been acquired by the United States. In addition, British money brokers, who had made large loans to Mexico, were pushing Mexican officials to end the war and pay off Mexico's debts. Under these circumstances, "the United States virtually dictated the terms of the [Treaty]." So one-sided was the treaty in favor of the United States that the American political party, the Whigs, who were opponents of the war, concluded that the treaty was morally bankrupt. Despite this, Mexico sought to provide certain rights for Mexican citizens in the territories ceded under the treaty to the United States.

Article VIII of the Treaty provided that:

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within . . . the United States . . . shall be free to continue where they now reside, or to remove . . . to the Mexican Republic . . . .

Those who shall prefer to remain in said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in

zeitgeist shaped ideological formations that include notions that certain territories and people require and beseech domination 

14. See id. at 40.
15. See id. at 28-29, 51 ("The recurring theme in the writings of treaty advocates was that by ending the war, the treaty saved Mexico from possible obliteration as a nation.").
16. See id. at 40-41.
17. Id. at xii.
19. See Del Castillo, supra note 13, at 26. The Whigs also opposed the Treaty because they thought the annexation of territory "would increase the slavocracy's power in Congress." Id at 44.
20. See id. at 62-86.
the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.\footnote{21}

Article VIII also provides that:

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.\footnote{22}

Finally, Article IX provides that:

Mexicans who . . . shall not preserve the character of citizens of the Mexican republic . . . shall be incorporated into the Union of the United States, and be admitted . . . to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.\footnote{23}

Since Mexico did not have much bargaining power when it entered into the Treaty, it would have been surprising if it had been successful in its effort to protect the former Mexican citizens in the conquered territories. And, indeed, the Treaty of Guadalupe Hidalgo was unable in significant ways to protect the rights of the new American citizens and their Mexican-American descendants.\footnote{24} For example, scholars have documented how Mexican-Americans were generally unable to protect their property rights arising under Spanish and Mexican land grants.\footnote{25} For instance, in New Mexico approximately three-fourths of the land claims were found to be invalid by the American courts.\footnote{26}

Indeed, American tribunals basically ignored the provisions of the treaty in deciding Mexican property claims.\footnote{27} In this regard, Congress has often “superceded treaty pledges by later enacted stat-

\footnote{21}{Treaty of Guadalupe Hidalgo, \textit{supra} note 1, at art. III.}
\footnote{22}{\textit{Id.} Interestingly, there is some authority for the proposition that general principles of international law hold that private property rights should be unchanged following a conquest. \textit{See}, e.g., \textit{Ely's Administrator v. United States}, 171 U.S. 220, 223 (1898) ("[I]n harmony with the rules of international law. . . the change of sovereignty should work no change in respect to rights and titles").}
\footnote{23}{Treaty of Guadalupe Hidalgo, \textit{supra} note 1, at art. IX.}
\footnote{24}{\textit{See} Johnson, \textit{supra} note 12.}
\footnote{25}{\textit{See} Klein, \textit{supra} note 7, at 218. \textit{See also} Bowden, \textit{supra} note 9, at 472, 497.}
\footnote{26}{\textit{See} Klein, \textit{supra} note 7, at 218.}
\footnote{27}{\textit{See id.}}
utes.”28 The courts have justified this practice by acknowledging the equal status of treaty and federal statute and applying the more recent law where there is a conflict.29 The equality of treaty and federal statute undermined the Treaty provisions regarding the rights to property.30 In this connection, the property rights provisions of the Treaty are not viewed as "self-executing."31 As a result, they were not effective until Congress had passed laws to implement the Treaty.32 Accordingly, the courts relied on the implementing legislation — and not the Treaty — in deciding Hispanic land claims.33

That legislation imposed a number of significant obstacles on the Mexican-American claimants.34 For example, the legislation placed on Mexican claimants the burden of proving that they had a right to the land.35 It also required the Mexican landowners to make their way through a complex set of legal requirements in a foreign legal system and in a language that was foreign to them.36 In this regard, language difficulties particularly worked to the disadvantage of the Mexican claimants, resulting in the loss of claims.37 Mexican claimants also lost out because American tribunals would ignore, misunderstand or distort Mexican law in determining the validity of claims.38

28. Id. at 217. Some Mexican defenders of the Treaty apparently misunderstood this aspect of American law. For example, Bernardo Couto argued that “the rights of former Mexican citizens would be protected because, in American law ‘every treaty has a superiority and preference under civil legislation.’” DEL CASTILLO, supra note 13, at 51.

29. See Klein, supra note 7, at 217. Interestingly, Louis Henkin contends that such equality cannot be supported on the basis of Article VI of the Constitution. See Louis Henkin, Foreign Affairs and the Constitution 156-57, 163-64 (1972).

30. See Klein, supra note 7, at 217.


32. See Klein, supra note 7, at 217; see also Vásquez, supra note 31, at 695 (“At a general level, a self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by Congress, and a non-self-executing treaty, conversely, as a treaty that may not be enforced in the courts without prior legislative ‘implementation’”). Interestingly, “under Mexican law, international treaties signed by the President and approved by the Mexican Senate are” self-executing, without the need to implement them through legislation. Robert E. Lutz, Law, Procedure and Culture in Mexico under the NAFTA: The Perspective of a Nafta Panelist, 3 SW. J. L. & TRADE AM. 391, 401 (1996).

33. See Klein, supra note 7, at 218.

34. See id.

35. See id.

36. See id.


38. See id. (“In the analysis of the property rights, the new legal regime selectively ignored Mexican law. It indulged new legal interpretations that contradicted long established [Mexican] law determining a grant’s validity in the antecedent government.”).
The implementing legislation devalued the Treaty's promises in other significant ways. For example, the Treaty's guarantee that property rights would be respected was limited by legislation in California to a period of two years. Under the California Land Settlement Act of 1851, if one failed to assert a land claim within two years, the claimed property would be deemed to be in the public domain.

The implementing legislation also established what might be regarded as alternative dispute resolution to resolve claims. Thus, under the California Land Settlement Act, claims were to be submitted to a special three person commission. Similarly, Congress established the position of surveyor general to resolve Hispanic land claims in the territory of New Mexico. "The surveyor general was directed to investigate land claims and to issue recommendations to Congress whether to confirm or reject such claims." These alternative tribunals sometimes created difficulties for the Mexican claimants. For example, the surveyor general lacked sufficient resources to determine title to millions of square miles of territory. Moreover, most of the surveyor generals lacked legal training and were not in a position to resolve difficult questions of law regarding the validity of the Hispanic land grants. In addition, Congress failed to act in a timely manner upon the surveyor general's recommendations.

Similarly, the Treaty failed to protect full membership rights in American society to persons of Mexican ancestry. In this regard, white identity traditionally has been a source of privilege and protec-

40. See Klein, supra note 7, at 220; California Land Settlement Act, supra note 39 at § 13.
41. See Klein, supra note 7, at 220; see also United States v. Ritchie, 58 U.S. 525, 533 (1854) (the board of commissioners was not a court, under the constitution, invested with judicial powers).
42. See Klein, supra note 7, at 225. See also Bowden, supra note 9, at 474 ("the primary responsibility for the adjustment of private land claims in New Mexico was vested in the Surveyor General").
43. Klein, supra note 7, at 225.
44. See id. See also DEL CASTILLO, supra note 13, at 78 (discussing claimants' difficulties with the surveyor general's office).
45. See Bowden, supra note 9, at 474. See also DEL CASTILLO, supra note 13, at 79 ("The process of reviewing the New Mexico claims gave no assurance that the Treaty of Guadalupe Hidalgo, or indeed the rule of law, outweighed the political influence of those behind the scenes").
46. See Klein, supra note 7, at 225. See also Bowden, supra note 9, at 472 ("the history of the effort to solve the land grant problem in... the area ceded to the United States by Mexico – the 'Southwest' – is one filled with disinterest, indecision and delay") (footnote omitted).
Indeed, during the time of slavery in this country, because whites could not be enslaved, the color line between black and white protected one in a very important way: whiteness prevented one from being transformed into property. The status of being white has therefore been an important asset and has usually provided one with valuable privileges and benefits.

Given this, one might have thought that the Treaty would have provided for full membership rights since the Treaty operated to construct the race of Mexican-Americans as legally white. A Texas federal court addressed in an immigration context the question of whether Mexicans were white in *In re Rodriguez.* At that time, the federal naturalization laws required that an alien be white in order to become a citizen of the United States. There, the court stated that Mexicans would probably be considered non-white from an anthropological perspective. The court noted, however, that the United States had entered into the Treaty of Guadalupe Hidalgo with Mexico. That Treaty expressly allows Mexicans to become citizens of the United States. Under these circumstances, the court concluded that Congress intended that Mexicans were entitled to become citizens. Thus, the court held that Mexicans were white within the meaning of

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48. See Harris, supra note 47, at 1721.

49. See id. at 1713; see also Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible,* 35 Santa Clara L. Rev. 881, 893-94 (1995) (defining white privilege as "an invisible package of unearned assets" which is "like an invisible weightless knapsack of special provisions, assurance, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks") (citing Peggy McIntosh, *Unpacking the Invisible Knapsack: White Privilege,* in CREATION SPIRITUALITY 33 (Jan./Feb 1992)).

50. 81 F. 337 (W.D. Tex. 1897).


52. See *In Re Rodriguez,* 81 F. 337 at 349.

53. See id. at 350-52.
the naturalization laws. Through the social and political process of treaty making, then, Mexican-Americans became "white."55

Since the law recognized Mexican-Americans as white, one might have expected that social action would have reflected the Mexican-American's privileged legal status as white. Legal recognition of Mexican-Americans as white, however, did not provide Mexican-Americans with full membership rights. Far from deriving protection from the Treaty and their legal definition as white, Mexican-Americans faced discrimination throughout the American Southwest very similar to that experienced by African-Americans.56 Thus, Mexican-Americans were excluded from public facilities and neighborhoods and were the targets of racial slurs.57 Mexican-Americans typically lived in one section of town because they were not allowed to purchase or lease housing anywhere except in the "Mexican Colony," irrespective of their social standing.58 Similarly, Mexican-Americans were segregated in public schools.59 Mexican-Americans also faced significant discrimination in the area of employment.60 Moreover, police officers often discriminated against Mexican-Americans.61 When Mexican-Americans and Mexican immigrants attempted to assert their civil

54. See id. at 354-55.


57. See Martínez, supra note 56, at 573.


59. See Martínez, supra note 56, at 584. See also Guadalupe San Miguel Jr., "Let All of Them Take Heed": Mexican-Americans and the Campaign for Educational Equality in Texas, 1910-1981, 54-55 ("School officials and board members, reflecting the specific desires of the general population, did not want Mexican students to attend school with Anglo children regardless of their social standing, economic status, language capability, or place of residence"); Richard Delgado, Rodrigo's Twelfth Chronicle: The Problem of the Shanty, 85 Geo. L. J. 667, 673 (1997) ("School authorities sent Mexican kids to schools that were different from – and inferior to – the ones attended by Anglo children"); Michael A. Olivas, Torching Zozobra: The Problem with Linda Chavez, Reconstruction, Vol. 2, No. 2, 48, 51 (1993) (noting that Mexican-Americans were isolated in underfunded schools).

60. See, e.g., Carey McWilliams, North From Mexico 195-97 (1948).

rights under laws designed to protect them, the courts generally failed to protect them.\(^6^2\)

Interestingly, at the time the Treaty was being negotiated, some in Mexico opposed ratification of the Treaty based on the ground that the Mexican citizens in the ceded territories would not be protected.\(^6^3\) In particular, Manuel Crescencio Rejon argued that American racism would cause them to be treated unjustly.\(^6^4\) He wrote: "[t]he North Americans hate us, their orators deprecate us even in speeches in which they recognize the justice of our cause, and they consider us unable to form a single nation or society with them."\(^6^5\) These concerns proved to be prophetic. Through these and other legal devices, the promises of the Treaty were minimized and devalued. As a result, the Mexicans' and their Mexican-American heirs' rights were denied and their property lost.\(^6^6\)

III. THE NAFTA AND THE TREATY OF GUADALUPE HIDALGO

This section of the article seeks to explore parallels between the NAFTA dispute resolution process and the dispute settlement process of the Treaty of Guadalupe Hidalgo. In this regard, it argues that Mexico negotiated both treaties from a very weak bargaining position. In doing so, the NAFTA dispute resolution process may generate a number of difficulties for Mexico that parallel problems that Mexican claimants experienced in litigating their rights under the earlier Treaty. For example, Mexico may experience problems in dealing with a foreign procedural system, i.e., the NAFTA dispute settlement process which is based on Anglo-Saxon notions. Mexico may also experience difficulties arising out of the fact that the NAFTA dispute resolution procedures constitute alternative dispute resolution. In the

\(^6^2\) See generally Martínez, supra note 56; Kevin R. Johnson, Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century, 8 LA RAZA L.J. 42, 45-56 (1995) (reviewing limits of litigation for Latinos and contending that such strategies must be combined with efforts at political mobilization).

\(^6^3\) See Del Castillo, supra note 13, at 49-50.

\(^6^4\) See id. at 50.

\(^6^5\) Id.


"purported to guarantee to Mexicans caught on the U.S. side of the border full citizenship and civil rights, as well as protection of their culture and language. The Treaty, modeled after ones drawn up between the U.S. and various Indian tribes, was given similar treatment: the Mexicans' '[l]and and property were stolen, rights were denied, language and culture suppressed, opportunities for employment, education and political representation were thwarted.'")

course of the discussion, this section points out that in constructing the NAFTA dispute resolution procedures, Mexico was treated in ways that parallel the dominant society's treatment of Mexican-Americans in the years since the Treaty of Guadalupe Hidalgo.

A. Unequal Bargaining Power for Mexico

The United States and Mexico entered into NAFTA in the 1990s. Similar to the Treaty of Guadalupe Hidalgo, Mexico negotiated the NAFTA from a very weak bargaining position. Mexico was under great internal and external pressures to enter into the NAFTA. With respect to internal pressures, the Mexican government needed to justify its programs against the criticism of its opponents. As to external pressures, Mexico believed that it would suffer serious problems in the global economy if it failed to find new markets. On the other hand, the United States had the greatest bargaining power in the NAFTA negotiations. The NAFTA was simply not as important to the United States' economy as it was to Mexico's. The American economy is twenty-five times the size of Mexico's. This difference in the relative economic importance of the agreement insured that the United States had greater bargaining power in the NAFTA negotiations. Under these circumstances, just as the United States had virtually dictated the terms of Treaty of Guadalupe Hidalgo, the United States imposed conditions on the weaker party,

67. See North American Free Trade Agreement, supra note 2. See also Zamora, supra note 3, at 402 ("The NAFTA negotiations took place over a twelve month period, from August 1991, until the announcement by U.S., Mexican and Canadian trade negotiators on August 12, 1992, that negotiations on the agreement had been completed") (footnote omitted).


69. See id. at 63. See also Zamora, supra note 3, at 394 (Mexico was willing to enter into the NAFTA because "the political leadership of Mexico – President Carlos Salinas de Gortari and the leaders of the Partido Revolucionario Institucional . . . [felt] that there [was] no viable alternative").

70. See Oquendo, supra note 68, at 63. See also Zamora, supra note 3, at 395 (the political leadership of Mexico "realizes that it can preserve a measure of its political monopoly only if the economy prospers and only if jobs and salaries increase. In the judgment of President Salinas and his advisors, this can only happen by increasing its trade and investment with the United States").

71. See Oquendo, supra note 68, at 63.


73. See id.

74. See id.

75. See id.

76. See Del Castillo, supra note 13, at xii.
Mexico. In negotiating the Treaty, Mexico was reluctant to press its interests and too willing to make concessions.77

B. Parallels Arising Out of NAFTA’s Imposition of an Anglo/Saxon Procedural System on Mexico and The Problem of Dealing with a Foreign Procedural System

In the dispute resolution context, Mexico’s weak bargaining position resulted in the United States imposing on Mexico, especially in the areas of antidumping and countervailing duties, procedural rules based on United States procedural law.78 The NAFTA provides for four major dispute resolution devices.79 Chapter 20 provides a way to resolve general disputes regarding the interpretation or application of the NAFTA.80 The Chapter 19 dispute resolution mechanism applies only to antidumping and countervailing duty disputes between the NAFTA parties.81 "‘Dumping’ is an unfair trade practice, whereby products of one country are exported to another country at below cost or at less than the domestic price of the products."82 ‘Antidumping’ or ‘countervailing’ duties are duties that are imposed by the importing country to compensate for the unfair price of the exported products.83 Each of the NAFTA parties has its own statutes that outlaw the dumping of imported goods and establish a way to place countervailing duties on imported goods that are priced too low.84 All of these laws remain valid under the NAFTA.85 The NAFTA, however, provides that decisions by National Tribunals on antidumping and countervailing duty disputes are subject to review by binational

77. See Oquendo, supra note 68, at 63-64.
78. See id. at 85.
81. See Lopez, supra note 4, at 173.
82. Id. citing DOMINICK SALVATORE, INTERNATIONAL ECONOMICS 212 (1983).
83. See Lopez, supra note 4, at 173.
84. See Johnson, supra note 72, at 2184. See also Lopez, supra note 4, at 173 ("Mexico, Canada, and the United States all have in place domestic statutes that create mechanisms for investigating allegations of dumping and for implementing appropriate countervailing duties").
85. See Johnson, supra note 72, at 2184.
Beyond the Chapter 19 and 20 procedures, the North American Agreement on Environmental Cooperation (the "Environmental Side Agreement") provides dispute settlement procedures that may be employed to resolve controversies involving environmental laws. Similarly, the North American Agreement on Labor Cooperation (the "Labor Side Agreement") provides a dispute settlement process for certain types of labor controversies.

The NAFTA Chapter 19 panel review procedure provides a striking illustration of how the United States imposed an American procedural superstructure on Mexico. The Chapter 19 panel review procedure reproduces the details of American procedure. For instance, the Chapter 19 panel rules copy, often verbatim, many aspects of the American Federal procedure. The panel rules provide for an opening pleading stage and a later phase of briefing and an oral hearing that is based on American Federal Trial and appellate practice. In addition, in describing the objective of the Chapter 19 panel procedural rules, the panel procedures mirror the American system. Thus, Rule 2 of the Chapter 19 rules says that "the purpose of these rules is to secure the just, speedy and inexpensive review of final determinations." This provision imitates Rule 1 of the Federal Rules of Civil Procedure, which provides that the rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every action."

86. See id. at 2185. Interestingly, some have questioned the constitutionality of having these disputes decided by supranational panels possessing binding authority. See e.g., Robert P. Deyling, Free Trade Agreements and the Federal Courts: Emerging Issues, 27 St. Mary's L.J. 353, 376-81 (1996); Demetrios G. Metropoulos, Constitutional Dimensions of the North American Free Trade Agreement, 27 Cornell Int'l L.J. 141, 159-68 (1994).


89. See Oquendo, supra note 68, at 80.
90. See id. at 81.
91. See id.
92. See id. at 82.
There are many other similarities between the Chapter 19 Rules and the American Federal Rules of Civil Procedure. For example, section 3 of Panel Rule 55, governing the signings of pleadings, duplicates Federal Rule 11.95 In addition, the format of the pleadings96 and motions97 in the Chapter 19 and American procedural systems are very similar.98 Moreover, the briefs permitted in Chapter 19 panel reviews mirror those employed in the American federal appellate practice.99 The panel review oral hearing finds in counterpart in the oral proceedings that are held in the American federal courts of appeal.100 Thus, the Chapter 19 panel rules have duplicated the procedural details of the American federal procedural system.

Beyond imitating the American procedural details, the Chapter 19 procedural rules also reflect American conceptions of procedure.101 In this regard, the Chapter 19 panel review procedure is focused on a single hearing, in which the lawyers advance their perspectives on the facts and applicable legal principles.102 Significantly, the centering on a single event is a key aspect of the American common law tradition.103 In addition, the Chapter 19 panel review procedure also incorporates the traditional American common law idea of a distinct and drawn-out opening pleading stage.104 The Chapter 19 panel procedure also embraces the traditional reactive or passive role of the American common law judge by relegating to the Chapter 19 panel to

95. Cf. 1904 Panel Rules, supra note 93, rule 55(3) ("Every pleading filed on behalf of a participant in a panel review shall be signed by counsel for the participant or, where the participant is not represented by counsel, by the participant") with FED. R. CIV. P. 11 ("Every pleading, written motion, and other paper [of a party represented by an attorney] shall be signed by at least one attorney of record in the attorney's individual name, or if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signor's address...").

96. Cf. 1904 Panel Rules, supra note 93, at rule 39(2) ("Every complaint... shall contain the following information:... the precise nature of the Complaint... [and] a statement describing the interested person's entitlement to file a Complaint") with FED. R. CIV. P. 8(a) ("A pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief").

97. Cf. 1904 Panel Rules, supra note 93, at rule 61 (3)(a) ("Every notice of Motion... shall contain... a statement of the grounds to be argued.") with FED. R. CIV. P. 8(a) (The motion "shall state the grounds therefore").

98. See Oquendo, supra note 68, at 82.
99. See id. at 83.
100. See id. at 84.
101. See id. at 85.
102. See id.
103. See id.
104. See id. at 86.
a passive role.\textsuperscript{105} Thus, the American common law tradition forms the conceptual basis for the Chapter 19 panel review process.

In so doing, the panel review procedure ignores or renders invisible the Mexican point of view.\textsuperscript{106} Perhaps the best illustration of this point is that the rules provide that English or French may be employed when a panel reviews a Canadian judgment.\textsuperscript{107} In addition, the rules provide that if the proceedings implicate legal issues that are of "general public interest or importance" or are conducted, at least in part, in both English and French, there must be simultaneous translation in both English and French.\textsuperscript{108} Clearly, the rules should have provided for the use of Spanish as well.\textsuperscript{109} Almost all of Mexico's citizens speak Spanish, and few speak fluent English.\textsuperscript{110} Despite this, the NAFTA does not expressly provide for the use of Spanish in panel reviews of Mexican judgments.\textsuperscript{111}

The omission or invisibility of the Mexican perspective as shown in the failure to provide for Spanish in the NAFTA finds an important parallel in the fact that since the Treaty of Guadalupe Hidalgo, the perspective of Mexican-Americans has been rendered virtually invisible. One of the identifying characteristics of being a Mexican-American or a Latino in the United States is being ignored as if they do not exist.\textsuperscript{112} Latinos have been virtually absent from the leading venues of mainstream American society, including civil rights discourse,\textsuperscript{113} his-

\textsuperscript{105} See id. at 87.
\textsuperscript{106} See id. at 80.
\textsuperscript{107} See 1904 Panel Rules, supra note 93, rule 29.
\textsuperscript{108} Id. at rules 30 and 31.
\textsuperscript{109} See Oquendo, supra note 68, at 79.
\textsuperscript{110} See id.
\textsuperscript{111} See id.

\textsuperscript{113} See, e.g., Rachel Moran, Foreword - Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond, 8 LA RAZA L. J. 1, 10 (1995) (Although the Black/White race paradigm "has elevated race and ethnicity to a position of central importance in defining equality of opportunity... race and ethnicity have proven to be somewhat artificial organizing principles for Latinos because they have different racial origins and come from a range of countries." ); Deborah Ramirez, Multicultural Empowerment: It's Not Just Black and White Anymore, 47 STAN. L. REV. 957, 958 (1995) ("When courts and legislatures first created race-conscious remedies in the 1960s, the United States was seen as a black and
torical accounts,114 leading periodicals115 and popular culture.116 Kevin Johnson has described this invisibility by referring to Latinos as "Los Olvidados," or "the Forgotten Ones."117

In any event, this failure to consider the Spanish language could have adverse consequences for Mexico in NAFTA dispute resolution. As we observed in the Treaty of Guadalupe Hidalgo context, one of the factors that helped generate adverse litigation results for the former Mexican citizens and their heirs were problems with dealing with an English language legal system in the American courts.118

Beyond this, the fact that Mexico would have to deal with a foreign procedural system in the NAFTA context should raise concern for Mexico's prospects in NAFTA dispute resolution. As discussed, the NAFTA panel review procedure basically reproduces U.S. procedural law.119 Mexico, however, has a legal system that is distinct from that of the United States.120 Since Mexico is a civil law jurisdiction, its legal system is more similar to those found in "continental Europe than that of the United States."121 The Mexican conception of procedure is fundamentally different from the American common law sys-
In contrast to the American system, Mexican civil procedure is not centered on a single, formal oral hearing. Under Mexican law, there is no trial of a case. Instead, the parties present evidence at a number of hearings. A series of hearings reduces the possibility of surprise. Since there is no limit on the number of hearings, new information can always be examined at later hearings. The series of hearings also encourages settlement. In not focusing on a single concentrated event, the Mexican procedural system is firmly based in the tradition of the civil law. One commentator has described the civil law tradition as follows:

There is no such thing as a trial in our sense; there is no single, concentrated event. The typical civil proceeding in a civil law country is actually a series of isolated meetings of and written communications between counsel and the judge, in which evidence is introduced, testimony is given, procedural motions and rulings are made, and so on.

Thus, the Mexican civil procedure arises from a different and distinct legal tradition than that of the United States.

The civil law procedural system differs from the common law system in other ways. For example, discovery is less important in the civil law tradition. In addition, civil law judges seem to be more active than traditional common law judges. For instance, Mexican judges take a major role in questioning witnesses. Because the judge is more active in the civil tradition, the parties are not as independent.

The civil law tradition also has a different notion of an appeal from

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123. See Oquendo, supra note 68, at 91.
124. See id. at 91-92.
125. See id. at 91.
126. See id. at 92.
127. See id.
128. See id.
129. See id. at 93.
130. See id.
132. See Oquendo, supra note 68, at 99.
133. See id.
134. See id. at 100-01.
135. See id. at 105.
that found in the common law system. Given all of this, it is clear that Mexico has a distinct civil procedure, stemming from the civil law tradition. Thus, the Mexican legal system is foreign to that of the United States. Accordingly, Mexico is required, under NAFTA, to litigate in a foreign procedural superstructure.

The United States Supreme Court has expressed concern about the fairness of requiring parties to litigate in a foreign system. In Asahi Metal Industry Co. v. Superior Court, Gary Zurcher, a resident of California, was hurt when his motorcycle tire exploded while he was traveling on a California highway. He filed a lawsuit in a California state court against the Taiwanese manufacturer of the tube, Cheng Shin. Cheng Shin then sought indemnification from Asahi Metal, the Japanese entity that supplied the tube valve assemblies to the Taiwanese company. Asahi Metal moved to dismiss for lack of jurisdiction. In concluding that the Due Process Clause of the United States Constitution did not permit the exercise of personal jurisdiction over Asahi Metal, the Court expressed serious concerns about the fairness of requiring parties to submit their disputes to a foreign nation's judicial system. The Court observed that there are "unique burdens placed upon one who must defend oneself in a foreign legal system." In light of this heavy burden, the Court con-

135. See id. at 106.
137. See Asahi, 480 U.S. at 106.
138. See id.
139. See id.
140. See id.
141. See id. at 116.
142. Id. at 114. Other jurisdictions have recognized the burdens that outsiders face in a foreign legal system. Thus, historically some jurisdictions have sought to ameliorate the foreignness of a legal system. For example, in ancient English legal practice, "[t]rials 'de medietate linguae,' literally 'trials of the half tongue' or trials in which one party was an alien whose native language was not English. James C. Oldham, The Origins of the Special Jury, 50 U. Chi. L. Rev. 137, 167 n.157 (1983); See Deborah A. Ramirez, The Mixed Jury and the Ancient Custom of Trial by Jury "De Mediate Linguae:" A History and A Proposal for Change, 74 B.U. L. Rev. 777, 783-96 (1994). See generally Marianne Constable, The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge (1994) (discussing history of mixed juries). "Such trials would be conducted before a jury with one half of the jury composed of noncitizens [sic] and one half citizens." Kevin R. Johnson, Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens, 21 Yale J. Int'l L. 1, 8 (1996) (citing Oldham, supra at 167-71. Clearly, the existence of mixed juries represented an effort to take into account the difficulties that outsiders face in a foreign legal system).
cluded that the exercise of personal jurisdiction by a California court over Asahi would be unreasonable and unfair.

Among the burdens that an outsider could experience in attempting to proceed in a foreign legal system is the danger of oppression. The strangeness and complexity of a legal system creates the danger of oppression. The danger is that those who are more familiar with the legal system will be able to use the system to their advantage. Those with superior knowledge of the legal system will be able to maneuver others into situations where the legal system will benefit them at the expense of others who are less familiar with the system. This amounts to oppression.

Given the reasoning in *Asahi* and the problem of oppression, it would seem that Mexico would also face "unique burdens" in being required to litigate in the NAFTA dispute resolution process – a foreign procedural system. In this regard, one of the obstacles that Mexican claimants faced in litigating claims under the Treaty of Guadalupe Hidalgo was having to litigate in the foreign American legal system. Thus, there is reason to question whether the results of the NAFTA dispute resolution process will be reasonable and fair to Mexico.

In this connection, NAFTA's imposition of a foreign procedural structure on Mexico, in effect, forces Mexico to assimilate into the dominant United States legal system. There are parallels here with respect to dominant American society's treatment of Mexican-Americans in the years since the Treaty of Guadalupe Hidalgo. It is widely thought that Mexican-Americans and other Latinos should assimilate into the American mainstream. They are said to have a duty to learn English, surrender the culture of their origins, and become "American." Certain groups have sought to enforce, through law, this purported obligation to assimilate. For example, the English-

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144. See id.

145. See id.

146. See supra notes 36-38 and accompanying text.


148. See Martínez, supra note 147; Johnson, supra note 147, at 79.

149. See Martínez, supra note 147.
only advocates seek to eliminate the use of Spanish,150 and immigration restrictionists151 seek to curtail immigration of Latinos on the ground that they wrongfully refuse to assimilate.152 Thus, in the years since the Treaty of Guadalupe Hidalgo, the dominant American society has sought to force Mexican-Americans to assimilate Anglo-Saxon ideals just as the NAFTA seeks to force Mexico to assimilate into an Anglo-Saxon procedural system.

A certain conception of historical development rooted in the nineteenth century has generated this push toward assimilation. According to this conception, progress requires assimilating smaller cultures into larger cultures.153 Thus, for both leftists and liberals in the last century, the major nations were the vehicles of positive change.154 For example, John Stuart Mill wrote:

Experience proves it is possible for one nationality to merge and be absorbed into another: and when it was originally an inferior and more backward portion of the human race absorption is greatly to its advantage. Nobody can suppose that it is not more beneficial to a Breton, or a Basque of French Navarre, to be brought into the current of the ideas and feelings of a highly civilized and cultivated people – to be a member of the French Nationality, admitted on equal terms to all the privileges of French citizenship . . . than to sulk on his own rocks, the half- savage relic of past times, revolving in his own little mental orbit, without participation or interest in the general movement of the world.155

On this view, smaller countries were underdeveloped and could only become modern by giving up their native culture and assimilating into the larger nation.156 Significantly, this view provided not only a justification for assimilating minorities into the larger state but also


151. See generally Peter Brimelow, ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER (1995) (arguing that failure of Latinos to assimilate into dominant Anglo-Saxon culture justifies drastic restrictions on immigration).

152. See Martínez, supra note 147.


154. See id.

155. Id. citing John Stuart Mill, Considerations on Representative Government (1861), in UTILITARIANISM ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 395 (H.B. Acton ed. 1972).

156. See THE RIGHTS OF MINORITY CULTURES, supra note 153 at 5-6.
for colonizing other people elsewhere.\textsuperscript{157} This conception of historical development is based on a key assumption – that "progress and civilization require[d] assimilating 'backward' minorities to 'energetic' majorities."\textsuperscript{158} This nineteenth century assumption, however, has gradually been rejected.\textsuperscript{159} For example, the contention that the Czechs could not take part in modernity except by being absorbed into Germany has been shown to be mistaken.\textsuperscript{160} Similarly, other groups—the Flemish, Québécois, and Basques—also have been able to resist assimilation and nevertheless exist as thriving modern cultures.\textsuperscript{161}

Despite this, this outmoded conception of history seems to have been at work in the NAFTA negotiation process and probably led to the NAFTA dispute resolution procedures incorporating Anglo-Saxon procedural notions. The presumption of the superiority of an Anglo-American world view over the Mexican world view operated in the NAFTA negotiations.\textsuperscript{162} Several Mexican negotiators have stated that during the NAFTA negotiations process the North American negotiators devalued Mexican perspectives as being rooted in a backward legal system.\textsuperscript{163} The American negotiators made it clear that they presumed the "inadequacy of Mexican law and legal institutions."\textsuperscript{164} Indeed, the NAFTA negotiation process was seen as an opportunity for the United States to "Americanize" Mexico, i.e., to promote a legal, political and economic system in Mexico that more closely resembles that of the United States.\textsuperscript{165} Thus, the NAFTA negotiations process

\textsuperscript{157} See id. at 6.
\textsuperscript{158} Id. (footnote omitted).
\textsuperscript{159} See id. at 6.
\textsuperscript{160} See id.
\textsuperscript{161} See id.
\textsuperscript{162} See Zamora, supra note 3, at 444. Psychologist Manuel Ramirez has described the presumption of superiority of a European or Anglo-American world view: "from the perspective of the European world view, peoples and cultures identified with traditional values and belief systems are assumed to be psychologically underdeveloped and in need of Europeanization or westernization. MANUEL RAMIREZ III, PSYCHOLOGY OF THE AMERICAS: MESTIZO PERSPECTIVES ON PERSONALITY AND MENTAL HEALTH 4 (Arnold P. Goldstein & Leonard Krasner eds., 1983). The European view can be contrasted with the mestizo world view. See Zamora, supra note 3, at 444. The mestizo perspective is consistent with the cultural attitudes of the Americas and emphasizes cooperation among diverse peoples. See id.
\textsuperscript{163} See Zamora, supra note 3, at 445.
\textsuperscript{164} Id.; see id. at 398-434.
\textsuperscript{165} See id. at 395 ("to be blunt, the United States can use NAFTA to 'Americanize' Mexico... While this goal may not be espoused openly, it is an important part of the agenda underlying the NAFTA negotiations"). Interestingly, some Mexicans opposed the Treaty of Guadalupe Hidalgo on the ground that it would lead to "the Americanization of Mexico." DEL CASTILLO, supra note 13, at 50.
may be viewed as an attempt to force Mexico to assimilate Anglo-Saharan ideals — e.g., Anglo-Saxon procedural notions — based on the outmoded assumption that such assimilation is necessary in order to allow "progress" i.e., Mexican participation in the modern world. In this regard, there is a striking parallel between the NAFTA negotiation process and the Treaty of Guadalupe Hidalgo negotiation process. Just as in the NAFTA negotiation process, American officials assumed an attitude of moral superiority in negotiating the Treaty of Guadalupe Hidalgo. They viewed the forcible incorporation or assimilation of almost one-half of Mexico's territory "as fulfilling the Manifest Destiny of the United States to spread the benefits of democracy to the lesser peoples of the continent."

In this connection, the differences between the American and Mexican legal systems could generate other problems. In the earlier Treaty of Guadalupe Hidalgo, difficulties in understanding Mexican law caused Mexican claimants to lose out. Similar difficulties in understanding Mexican law may generate problems for Mexico in NAFTA dispute resolution. The potential for such a problem is illustrated in litigating a Chapter 19 dispute, where Mexican lawyers may cite principles of Mexican law. This generates a difficulty of presenting an argument that can be understood by North American panelists. For example, consider the fundamental Mexican legal principle of motivación and fundamentación. This principle is one of the key aspects of Mexican constitutional law, and its meaning is well taught to Mexican law students. Since North American panelists do not possess a Mexican legal education, it would be very hard for them to comprehend and correctly apply this key Mexican legal principle. Thus, Mexico could face difficulties in the NAFTA dispute resolution process arising out of such misunderstandings.

That it is plausible that such confusions regarding Mexican law could occur is confirmed by recent experience regarding the Canada—U.S. Free Trade Agreement dispute settlement mechanism, which served as the model for NAFTA dispute resolution. In the re-

166. See Del Castillo, supra note 13, at xii.
167. Id. See also Martínez, En Aquel Entonces, supra note 12 ("modernity is the carrot offered by American society").
168. See supra notes 36-38 and accompanying text.
170. See id.
171. See id.
172. See id.
173. See id.
cent *Softwood Lumber III* case, serious concerns were expressed regarding the ability of Canadian panelists to understand American law, despite the fact that Canada belongs to the common law tradition. Writing in dissent, the American panelist, Judge Malcolm Wilkey, former Chief Judge of the Court of Appeals for the D.C. Circuit, found that the Canadian panelists had misunderstood American law and that this represented a threat to the dispute settlement system. He observed that the lack of training of Canadian panelists in United States administrative law presents a problem for the dispute resolution system. In addition, he stated that Canadians do not understand the place of legislative history in the American legal system or the principles on which American case law should be interpreted. Obviously, if Canadian panelists are unable to understand American law despite their common law training, then it seems unlikely that North American panelists will be able to understand Mexican law in light of the fact that Mexican law stems from a different and distinct civil law tradition.

C. A Parallel Arising Out of Disadvantages for Mexico Stemming from Alternative Dispute Resolution

The NAFTA dispute resolution procedures may also be viewed as alternative dispute resolution. There are three fundamental kinds of alternative dispute resolution that are used in an international setting: (1) mediation; (2) non-binding arbitration; and (3) binding arbitration. NAFTA uses all three types of alternative dispute resolution in one circumstance or another. Mediation procedure involves an effort by the parties to negotiate a settlement of their

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176. *See id.* at 824, 865.

177. *See id.* at 866; *Softwood Lumber III*, 1994 FTAPD 11, at * 220.

178. *See Gastle & Castel, supra* note 175, at 868.

179. *See generally,* Johnson, *supra* note 72. On the American domestic front, the later 1980s and early 1990s have been characterized by "an unprecedented rise of alternative dispute resolution (ADR) in public and private spheres at both the state and federal levels." *Barbara Allen Babcock & Toni M. Massaro, Civil Procedure: Cases and Problems* 329 (1997). "This movement toward more informal methods of dispute resolution is one of the most" important developments in modern civil procedure. *Id.*

180. *See Johnson, supra* note 72, at 2178.

181. *See id.*
Either party can ask for a mediator to resolve the dispute. The mediation process is governed by certain time limitations. Usually "the mediation provisions of trade agreements provide for some sort of permanent commission" whose members may act as mediators. "Chapter 20 [the] of NAFTA establishes such a commission."

As for nonbinding arbitration, it differs from mediation in that there is a third party who renders an opinion and states that one of the parties is at fault. The parties, however, do not agree to be bound by the arbitrator's report. Under the NAFTA, nonbinding arbitration is the method for settling almost all controversies that cannot be disposed of by mediation.

With respect to binding arbitration, the parties agree to be bound by the arbitrator's report and decision regarding a legal obligation. Under the NAFTA, some categories of disputes that involve binding arbitration are: investment, antidumping and countervailing duty controversies between a NAFTA party and citizens of another party.

In light of Mexico's relatively weak position with respect to the United States, the fact that the NAFTA's dispute resolution process involves forms of alternative dispute resolution is significant. Scholars have recently argued that alternative dispute resolution — e.g., mediation and arbitration — with its deformalized procedures poses special risks for weaker disputants. These scholars link fairness to formal-
ity. The fundamental notion is that the public and formal ideals of most societies are highminded and dedicated to equality. In a formal context, the average person will often act on these ideals. In an informal context, however, the same person may not feel constrained to behave in accordance with the community's formal ideals. As a result, traditional, formal in court adjudication is less likely to be influenced by bias than informal alternative dispute resolution. In such informal situations, there is a danger that decision making may be more inclined to be unfair with weaker disputants. Thus, weaker disputants should select a more formal setting for dispute resolution. Given this, Mexico, as a relatively weak disputant, must be concerned that the NAFTA alternative dispute resolution process may be biased against Mexico. This generates another parallel: Mexican claimants experienced difficulties arising out of the alternative dispute resolution-like regime established under the Treaty of Guadalupe Hidalgo.

D. The Early Results of the NAFTA Dispute Resolution Process

Given all of the above, it seems that there are reasons to conclude that the NAFTA dispute resolution process may put Mexico at a disadvantage just as the earlier Treaty of Guadalupe Hidalgo dispute resolution process placed Mexican claimants at a disadvantage. A review of the early results of the NAFTA dispute resolution process provides some evidence to support this conclusion. A major study analyzing the early results of the NAFTA dispute resolution process shows that Mexico has fared the least well of the three NAFTA countries. As of December, 1996, Mexico had "experienced some relatively signifi-

194. See Delgado, supra note 193 at 1398.
195. See id.
196. See id.
197. See id. at 1398-99. See also Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR," 19 FLA. ST. U. L. REV. 1, 3-4 (1991) ("courts try to use various forms of [alternative dispute resolution] to reduce caseloads and increase court efficiency at the possible cost of realizing better justice").
198. See Delgado, supra note 193, at 1398-99; see also Richard Delgado, et al., Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 WIS. L. REV. 1359, 1394 ("informal forums greatly disadvantage weaker parties").
199. See supra notes 41-46 and accompanying text.
200. See Lopez, supra note 4, at 204.
cant unfavorable rulings... but had no substantial favorable ruling to
offset" these setbacks.\textsuperscript{201} A couple of examples will suffice to illus-
trate this point. Consider the cement case,\textsuperscript{202} a Chapter 19 antidump-
ing case. The dispute arose when the United States promulgated a
final material injury order regarding the export of Mexican cement.\textsuperscript{203} In
response, Mexico initiated proceedings under the General Agree-
ment on Tariffs and Trade (GATT).\textsuperscript{204} In 1992, a GATT panel de-
cided that the American findings of material injury was mistaken and
that antidumping duties that had been placed on Mexican cement
should be returned.\textsuperscript{205} Despite this, the United States refused to com-
ply with the panel's decision.\textsuperscript{206} In 1995, the United States insisted
that it was proper to impose an antidumping duty on Mexican ce-
ment.\textsuperscript{207} In response, Mexico's leading cement company asked for a
NAFTA Chapter 19 panel to be established.\textsuperscript{208} In 1996, Mexico sus-
tained a significant loss when the NAFTA panel unanimously con-
cluded that the antidumping duties on Mexican cement were fully
justified.\textsuperscript{209}

Similarly, the "Cut-Length Steel Plate" case, another antidump-
ing case involved a Chapter 19 NAFTA panel.\textsuperscript{210} In 1994, the Mexi-
can government issued a final dumping and injury determination and
imposed large countervailing duties on Bethlehem Steel Corporation
(46.18\%) and USX Corporation (76\%).\textsuperscript{211} Subsequently, the two
United States companies invoked the Chapter 19 review process.\textsuperscript{212}
In a lengthy opinion and by a slim majority, the NAFTA panel issued
a decision against Mexico.\textsuperscript{213} The panel ordered Mexico to refund an-

\textsuperscript{201} Id.
\textsuperscript{202} See In re Gray Portland Cement ans Clinker from Mexico, No. USA-95-1904-02
\textsuperscript{203} Lopez, supra note 4, at 179.
\textsuperscript{204} See id.
\textsuperscript{205} See id.
\textsuperscript{206} See id.
\textsuperscript{207} See id.
\textsuperscript{208} See id.
\textsuperscript{209} See In Re Gray Portland Cement and Clinker from Mexico, No. USA-95-1904-02
(NAFTA Binat'l Panel, Sept. 13, 1996), 1996 FTAPD Lexis 4 at *29-36; Article 1904 Binational
Panel Reviews, 61 Fed. Reg. 54,621- 622 (NAFTA Sec., Dept. of Com. 1996); Lopez, supra note 4,
at 179.
\textsuperscript{210} See In Re Mexican Antidumping Investigation into Imports of Cut-to-Length Plate
Products from the United States, MEX-94-1904-02 (NAFTA Binat'l Panel, Aug. 30, 1995), 1995
\textsuperscript{211} See Lopez, supra note 4, at 180.
\textsuperscript{212} See id.
\textsuperscript{213} See id.
tidumping duties that had been placed on the American companies. The "panel, a majority of whose members were not trained in Mexican law," determined that Mexico had "failed to comply with basic [Mexican] constitutional and other applicable legal principles" in conducting the antidumping investigation. Under these circumstances, it is hardly surprising that Mexican officials have been troubled by outcomes of the first Chapter 19 panel discussions involving Mexico.

These early results of the NAFTA dispute resolution process have implications for determining the success of the NAFTA procedural system. One reason international trade agreements incorporate dispute settlement mechanisms is to try and prevent pre-agreement bargaining power from becoming post-agreement bargaining power. Thus, one way to judge the success of the NAFTA dispute resolution procedures is to evaluate whether they have prevented the pre-agreement bargaining power of the United States from becoming post-agreement bargaining power. In other words, have the NAFTA dispute resolution procedures helped equalize post-agreement bargaining power between the United States and Mexico? Since Mexico to date has achieved no significant victories in the NAFTA dispute settlement process, there is some reason to be concerned that the NAFTA dispute resolution procedures may not have been successful in preventing the United States' pre-agreement bargaining power from becoming post-agreement bargaining power.

214. See id.
218. See Johnson, supra note 72, at 2177. For example, Canada's Deputy Attorney General made these remarks on dispute settlement during the negotiation of the Canada-United States Trade Agreement:

We have done pretty well [at resolving trade disputes] in the past, but there are two reasons that I would advance have kept us from doing better. The first is what I would call the level playing field reason. This reason recognizes that the negotiating strengths of the two parties are not equal.... [M]echanisms to solve disputes are vital to Canada. The existence of such mechanisms are going to make or break the issue in Canada. Quite apart from the substantive disagreements, any agreement without a satisfactory dispute resolution mechanism will not be acceptable. We cannot have a system that will see differences resolved on the basis of raw power.

That the United States may have retained its pre-bargaining strength may also be indicated in the United States' willingness to disregard the NAFTA to satisfy internal political needs. For example, in 1996, Mexico requested Chapter 20 consultations concerning the United States' decision not to permit Mexican Trucking businesses additional access to American border states as expressly provided for by NAFTA.\textsuperscript{219} Previously, Secretary of Transportation Federico Peña had announced that the United States would not adhere to this NAFTA requirement.\textsuperscript{220} The American decision to ignore the NAFTA was viewed as the result of pressure from the American trucking industry.\textsuperscript{221} Similarly, Mexico sought to consult with the United States regarding the enactment of the Cuban-Liberty and Democratic Solidarity Act of 1996 (the Helms-Burton Act).\textsuperscript{222} This Act may constitute a breach of NAFTA because it establishes a private right of action against foreign businesses, including Mexican businesses, who knowingly profit from property taken by the Castro government.\textsuperscript{223} The Helms-Burton Act is seen as the product of political pressure of Cuban-Americans during an election year.\textsuperscript{224} These events suggest that the United States may be willing to violate or ignore NAFTA given sufficient pressure from domestic political interests.\textsuperscript{225}

IV. CONCLUSION

This article has sought to explore parallels between the dispute resolution process of the Treaty of Guadalupe Hidalgo and the NAFTA dispute settlement process. In this regard it has argued that

\begin{itemize}
  \item \textsuperscript{219} See Lopez, supra note 4, at 169.
  \item \textsuperscript{220} See id.
  \item \textsuperscript{221} See id. at 206.
  \item \textsuperscript{222} See id. at 169.
  \item \textsuperscript{224} See Lopez, supra note 4, at 206.
  \item \textsuperscript{225} See id. This behavior is consistent with the United States erratic history in honoring its treaty obligations. For example, the United States failed to abide by its treaties with Indian tribes. See Robert A. Williams, Jr., Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-100 (197); Robert A. Williams, Jr., The American Indian in Western Legal Thought: The Discourses of Conquest (1990). The United States also had had difficulty abiding by human rights treaties. See Sale v. Haitian Centers Council, 509 U.S. 155 (1993) (upholding return of Haitians fleeing political violence without determining whether they might be entitled to relief under international law); Johnson, supra note 12.
\end{itemize}
Mexico negotiated both treaties from a weak position. In so doing, the NAFTA dispute resolution process may generate a number of the difficulties for Mexico that parallel problems that Mexican claimants experienced in litigating their rights under the earlier Treaty. For example, Mexico may experience problems in dealing with a foreign procedural system *i.e.*, the NAFTA dispute settlement procedures. Among these problems are difficulties arising from language, from misunderstandings of Mexican law by North American panelists, and the unique burdens that are experienced by one who must litigate in a foreign legal system. The article also has argued that the NAFTA dispute resolution procedures may be viewed as alternative dispute resolution. It has contended that Mexico is likely to experience difficulties in such alternative dispute resolution in light of its relatively weak position. Given all of this, there is reason to believe that the NAFTA dispute resolution process may put Mexico at a disadvantage just as the earlier Treaty of Guadalupe Hidalgo dispute settlement process placed Mexican claimants and their heirs at a disadvantage. In this regard, an analysis of the early results of the NAFTA dispute resolution process demonstrates that Mexico has fared the least well of the three NAFTA countries.